BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SARAH BARNEY-HEFFNER Claimant	)	
VS.	)	
RUSSELL STOVER CANDIES Respondent	)	Docket No. **1,049,284**
AND	)	
TRAVELERS INDEMNITY CO. OF AMER. Insurance Carrier	)	

ORDER

Claimant requests review of the August 10, 2010 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

A preliminary hearing was held on claimant's request for medical treatment and temporary total disability benefits. Respondent denied it had been provided timely notice of the accident and further denied claimant had suffered accidental injury arising out of and in the course of employment. The Administrative Law Judge (ALJ) found claimant failed to give timely notice of her alleged accidental injury and therefore denied the requested benefits.

Claimant requests review of whether the ALJ erred in denying her claim due to lack of timely notice. Claimant argues that she told her supervisor as well as respondent's health and safety coordinator that she had injured her neck, shoulder and arm in a work-related accident. And she further argues she told them about the incident the day it had occurred.

Respondent argues that claimant never told her supervisor nor the health and safety coordinator that she had been hurt at work. Instead, she left work to seek medical treatment with her personal physician and requested time off under the Family Medical Leave Act. And it was not until her employment was terminated for failure to follow the requirements for additional leave pursuant to the Family Medical Leave Act that she finally

claimed a workplace injury. Consequently, respondent further argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment. In the alternative, respondent argues claimant failed to provide timely notice of her accident. Respondent notes that claimant alleged a discrete injury on January 11, 2010, on all the written exhibits but at preliminary hearing changed her testimony to indicate the accident date occurred on January 12, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant's job duties for respondent were weighing candy, feeding candy through belts, mopping and cleaning. Claimant testified that on January 12, 2010, she was lifting 50-pound mogul trays when she felt a pop in her neck, shoulder and arm with immediate pain. She further testified she told her supervisor, Tammy, who then referred claimant to Russ Lemonds.[1] Claimant testified she advised Mr. Lemonds that she had injured her neck, shoulder and arm at work but Mr. Lemonds sent her home without offering to send her to a doctor.

Conversely, Russell Lemonds, respondent's health and safety coordinator, testified that claimant came to his office on January 13, 2010, and told him that she was having chest pains and was light headed. She did not have any other pain complaints. He asked if she wanted an ambulance to take her to the hospital but she declined. Claimant never mentioned anything about an injury at work. He further testified that it was January 28, 2010, when he first became aware that claimant alleged an injury at work.

Virginia Helman, respondent's human resource manager, testified that on January 13, 2010, claimant came to her office and told her she was leaving work early to go see a doctor about her chest pains and shortness of breath and she wanted to apply for a medical leave of absence. Ms. Helman further testified that claimant did not have any complaints of pain in her shoulders and neck nor did she advise Ms. Helman that she had injured herself at work. The request was then faxed to Kansas City for approval. The request was approved and claimant was called back to Ms. Helman's office on January 14, 2010, to sign the documents approving her leave. The claimant signed the document which noted the reason for the requested leave was personal illness.[2]

---

[1] The testimony established that Tammy was a lead worker but not claimant's supervisor. And accidents were to be reported to the supervisor or Mr. Lemonds.

[2] Helman Depo., Ex. 2.

On January 13, 2010, claimant had sought medical treatment on her own at the Yates Center Medical Clinic. She complained of chest wall discomfort as well as shortness of breath. It was further noted that she had a bit of rash on her arms which she thought was from the racks she lifted at work that had fiberglass in them. Claimant was diagnosed with chest wall pain and rash. It appears claimant saw Dr. Sarah Nuessen on January 14, 2010, for follow-up and to have the doctor fill out the medical forms for her Family Medical Leave Act application. Dr. Nuessen noted claimant had severe left shoulder pain and diagnosed her with left shoulder strain. Claimant was taken off work for a week and was to follow-up with the doctor in a week or sooner if her condition worsened.

The medical leave granted claimant leave for a week and she was required to provide a medical update if additional days were requested beyond the week granted. When no additional medical documentation was provided, Diana Meyrand, respondent's assistant vice-president of human resources, sent claimant a letter dated January 25, 2010, notifying her that she had been separated from her employment effective January 21, 2010.[3] On January 27, 2010, claimant called Ms. Meyrand, asked about her job status and was told she had been separated from employment. Claimant then told Ms. Meyrand she believed she had hurt herself at work. Ms. Meyrand told her to file a report with Mr. Lemonds. Ms. Meyrand testified:

> Q. All right, what happened then?
>
> A. Ms. Heffner called me and identified herself on the phone. She said I just want to know if I have a job, and I said well, you know, you were approved for a leave of absence through a period of time, it's my understanding that we have not received any additional medical information from that, and we sent you notice of your separation of your employment. At that point in time she said well, I believe I hurt myself at work and I said well, if that is what you believe then you do need to go file a report with the local health and safety manager or coordinator who is Russ LeMonds. We don't make a determination of applicability, but you need to file your particulars with him.
>
> Q. Real briefly in that conversation you told her she exhausted her leave or she failed to comply with the terms of her medical leave, correct?
>
> A Correct.[4]

On January 27, 2010, claimant saw Dr. Shane Fejfar with a chief complaint of left shoulder pain. Claimant provided a history that lifting trays at work was probably when her arm started bothering her.

---

[3] P.H. Trans., Resp. Ex. 4.

[4] Meyrand Depo. at 7-8.

On January 28, 2010, claimant returned to Mr. Lemond's office and she filled out an accident report indicating an accident on January 11, 2010.[5] At claimant's attorney's request, claimant was examined and evaluated by Dr. Edward Prostic on March 1, 2010. Claimant provided a history of an injury on January 11, 2010, from repetitively lifting 50-pound racks at work.

The ALJ noted that it was only after claimant was notified that her employment was terminated that she told respondent that she had suffered a work-related injury and that such notice was not timely.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2009 Supp. 60-206(a) states:

> In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state, or observed as a holiday by order of the supreme court. When an act is to be performed within any prescribed time under any law of

[5] Lemonds Depo., Ex. 2.

> this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply.[6]

On January 27, 2010, claimant told Ms. Meyand that she believed she had suffered a work-related injury. She was directed to go to Mr. Lemond and fill out an accident report which claimant did on January 28, 2010. When claimant filled out the accident report for Mr. Lemond she indicated that the date of accident was January 11, 2010. Ten days from that date, excluding intervening weekends and the Martin Luther King holiday, would calculate to January 26, 2010. Consequently, if the date of accident was January 11, 2010, claimant did not provide notice of her accident within ten days. Conversely, if the date of accident was January 12, 2010, then her conversation with Ms. Meyand would have been on the tenth day.

The alleged date of accident is further confused by claimant's testimony that she suffered the injury, allegedly told her supervisor and was sent to Mr. Lemond on the day the accident occurred. But she did not see Mr. Lemond until January 13, 2010, and at that time his notes reflect that she did not mention a work injury. And at her doctor's appointment on January 13, 2010, claimant did not mention a neck or shoulder injury and instead complained of chest wall pain and a rash. Moreover, when claimant met with Ms. Helman on January 13, 2010, to request an application for medical leave she mentioned chest pain and shortness of breath but did not make any other complaints of pain nor allege a work injury. And when claimant returned to see Ms. Helman on January 14, 2010, to sign the paperwork for her medical leave she again did not complain of a work-related injury.

The evidentiary record reveals that claimant consistently listed the date of accident as January 11, 2010, including on her application for hearing and the recitation of the history of her injury to her medical expert. But when respondent raised timely notice as an issue at the preliminary hearing, claimant then stated that the evidence would show that the accident occurred on January 12, 2010. But the difficulty with that argument is that the contemporaneous records fail to indicate that claimant had suffered a work-related injury. The claimant did not complain of a work injury and instead requested medical leave under the Family Medical Leave Act for a personal illness. It was not until she was told that her employment had been terminated that she then alleged a work-related injury. Based upon the record compiled to date, this Board Member finds claimant failed to meet her burden of proof to establish that she suffered accidental injury arising out of and in the course of employment.

---

[6] See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated August 10, 2010, is affirmed but for the above foregoing reasons.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

_____
HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[7] K.S.A. 44-534a.

[8] K.S.A. 2009 Supp. 44-555c(k).